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No. 283

In the Supreme Court of the United States

OCTOBER TERM, 1960

FIRST NATIONAL BANK OF CHIPPEWA FALLS, ET AL.,
PETITIONERS

v.

CHARLES HENNEMAN COMPANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
CHARLES K. RICE,
Assistant Attorney General,
A. F. PRESCOTT,
DAVID O. WALTER,
Attorneys,
Department of Justice, Washington 25, D.C.

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OPINIONS BELOW

The memorandum decision of the trial court (Pet. 1a–3a) is not officially reported. The opinion of the Wisconsin Supreme Court (Pet. 3a–17a) is reported at 10 Wis. 2d 260.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered on May 3, 1960 (R. 247). The petition for a writ of certiorari was filed on August 1, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

QUESTIONS PRESENTED

1. Whether state or local real estate taxes may be levied and collected on the full market value of property which is subject to a federal tax lien, when there are mortgages on the property prior to the federal tax lien.

2. Whether mortgagees holding mortgages prior in time to a federal tax lien may pay local real estate taxes arising after the federal tax lien is filed and obtain a priority for the amount of those taxes over the earlier federal tax lien.

STATUTES INVOLVED

The statutes involved, Sections 3670, 3671, and 3672(a) of the Internal Revenue Code of 1939, are printed in the Appendix, *infra*, pp. 8-9.

STATEMENT

This is a case arising out of a foreclosure proceeding on three parcels of property, involving the priority of three mortgages, federal tax liens, and county real estate taxes. The facts as set out in the opinion of the court below (Pet. 3a–10a) can be summarized as follows:

On January 6, 1948, the Charles Henneman Company (hereafter referred to as the Company) executed a mortgage covering certain property of the Company situated in Chippewa Falls in Chippewa County, Wisconsin (which can be referred to as Lots 4, 5, and 6) to the First National Bank of Chippewa Falls (hereafter referred to as the Bank), recorded on January 9, 1948. On February 9, 1948, the Com-

pany executed a mortgage covering the same property and two other lots, Lots 8 and N ½ of Lot 1 to Andy and Violet Johnson (hereafter referred to as the Johnsons) recorded February 10, 1948 (Pet. 5a).

The United States on April 20, 1951, filed a notice of tax lien for federal taxes, penalties and interest in the amount of $96,827.82, due from the Company, in the office of the Register of Deeds of Chippewa County (Pet. 6a). The Company failed to pay the local real estate taxes on the mortgaged property for the years 1951, 1952, and 1953 (Pet. 15a).

The Bank brought this foreclosure action, in which the other parties became defendants. The Johnsons are seeking foreclosure of their mortgage. The United States has made claim for tax lien priority against all the mortgaged property. Chippewa County seeks priority for real estate taxes accruing since the filing of the notice of the federal tax lien. By stipulation of the parties the property has been sold clear of all liens, and the proceeds are held in substitution for the property (Pet. 3a).

On these facts the trial court concluded that the lien of the United States for federal taxes under Sections 3670 and 3671 of the Internal Revenue Code of 1939 extended to the entire sales proceeds, substituted in the foreclosure action for the real estate, but that by virtue of Section 3672 the Bank and the Johnsons were entitled to receive from the proceeds the amount due for principal, interest, costs, and attorney's fees under their respective mortgages, leaving the remainder for payment on the United States tax lien and nothing for payment on the real estate taxes (Pet.

4a–5a). As between the county and the mortgagees, the trial court in its decision reasoned that the state taxes were completely overridden by the federal tax lien, which encompassed the entire proceeds, leaving "nothing after the mortgage to which such taxes can attach." (Pet. 2a.) The court further stated that it was therefore unnecessary to decide whether the mortgagees could pay the taxes and thereby enlarge their lien as against the United States, and that such procedure was "most doubtful." (Pet. 2a.)

The Supreme Court of Wisconsin affirmed the trial court in giving priority over the federal tax lien to the mortgagees for the principal amounts, interest, costs, disbursements, and attorneys' fees,[1] and in awarding the balance to the United States ahead of the local taxes (Pet. 12a–13a). It stated (Pet. 11a) that the United States is not interested in whether the state receives its taxes prior to the mortgage creditors, citing *United States* v. *New Britain*, 347 U.S. 81, 88, but it held, in applying state law to those priorities, that the trial court erred in not holding that the state tax liens have priority over the mortgages (Pet. 16a–17a).

ARGUMENT

1. The first question sought to be presented by the petition is one on which the petitioner asserts (Pet. 22) there are no decisions except for the trial court in the present case. The constitutional claim was considered so insubstantial by the Wisconsin Supreme Court that it was not even mentioned in the opinion. Further-

[1] The question whether the attorneys' fees have priority over the federal tax lien was not litigated in this case.

more, the petition does not itself show that any substantial constitutional question is presented, merely stating without citation of authority (Pet. 19) that local real estate taxes may be levied only on the value of a mortgagee's interest. It does not show any conflict between the state rule and any federal statute. The petition, in short, attempts, without basis in the statutes or in decisions of the courts, to convert a purely state law question of the priority of real estate taxes over mortgages into a constitutional question. In the absence of a conflict of decision, there is, we submit, no occasion for this Court's intervention. In any event, this issue is one in which the United States has no direct interest, since its rights would not be affected by a reversal of the court below on this question.

2. The second question presented is one which has been the subject of decision by other courts, but as to which there is no conflict among the Courts of Appeals or the final state courts. Mortgage provisions or state law often give the mortgagee the power to pay local real estate taxes and add those amounts to the obligation secured by his mortgage. In the case where a mortgage is prior to the federal tax lien, and that in turn is prior to subsequently accruing state taxes, which in turn—under state law—have priority over the earlier mortgage, the question is whether a mortgagee may pay the taxes and obtain priority over the federal tax lien for reimbursement of the amount paid.

In the present case, the mortgagees did not in fact pay the local taxes, which were merely given priority in the proceeds over the mortgagees' claim, in accordance with state law. On this record, then, the issue is

the same as was specifically raised and answered by this Court unanimously in *United States* v. *New Britain*, 347 U.S. 81, 88, where this Court stated that—

> The United States is not interested in whether the State receives its taxes and water rents prior to mortgagees and judgment creditors. That is a matter of state law. But as to any funds in excess of the amount necessary to pay the mortgage and judgment creditors, Congress intended to assert the federal lien. * * *

Assuming, however, that the same issue is presented as if they had paid the taxes, the decision below is in accord with the other decisions on this issue. *United States* v. *Christensen*, 269 F. 2d 624 (C.A. 9); *United States* v. *Bond* (C.A. 4), decided May 31, 1960.[2] See also, *United States* v. *Wasserman*, 257 F. 2d 491 (C.A. 1). In *United States* v. *American Nat. Bank of Jacksonville*, 255 F. 2d 504 (C.A. 5), certiorari denied, 358 U.S. 835, cited in the petition (p. 24), the question of the allowability of a mortgagee's advances for taxes was not raised or considered. The case of *United States* v. *Seaboard Citizens Nat. Bank*, 206 F. 2d 62 (C.A. 4), did not involve the federal tax lien, and has been held inapplicable to this situation by the Fourth Circuit itself, in the *Bond* case.

In New York, the lower courts are divided on a closely related question, whether such local taxes may

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[2] The question is now pending before the Supreme Court of Michigan in *Union Central Life Insurance Co.* v. *United States*, and before the Illinois Appellate Court in *Supreme Savings & Loan Ass'n* v. *Rado*. In the present case, R.S. 3466 (31 U.S.C., Sec. 191) also gives the United States priority over local taxes. *United States* v. *Gilbert Associates*, 345 U.S. 361.

be paid as an expense of the foreclosure sale in priority over the earlier federal tax lien. In agreement with the *Bond* and *Christensen* cases are *Metropolitan Life Ins. Co.* v. *United States*, 9 App. Dir. 2d 356 (N.Y.); *Buffalo Savings Bank* v. *Victory* (N.Y. Sup. Ct., App. Div. Fourth Dept.), decided July 1, 1960, and *Stadelman* v. *Hornell Woodworking Corp.*, 172 F. Supp. 156 (W.D.N.Y.); but see *Rikoon* v. *Two Boro Dress, Inc.*, 9 App. Dir. 2d 783, leave to appeal denied, 7 N.Y. 2d 711. The Court of Appeals of New York has not yet resolved the difference between the lower courts of that state.

In summary, there is no conflict as to the limited issue raised by the petition for a writ of certiorari. Such conflict among the lower courts in New York as may exist in the related issue presented in the New York cases has not yet been resolved by the Court of Appeals of that State.

CONCLUSION

Since there is no conflict among the final appellate courts or with the decisions of this Court, the petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

A. F. PRESCOTT,
DAVID O. WALTER,
Attorneys.

AUGUST 1960.

APPENDIX

Internal Revenue Code of 1939:

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U.S.C. 1952 ed. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U.S.C. 1952 ed. 3671.)

SEC. 3672. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) [As amended by Sec. 505 of the Revenue Act of 1942, c. 619, 56 Stat. 798.] *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has

by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * * *

(26 U.S.C. 1952 ed. 3672.)

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